FILED
SID J. WHITE
FEB 12 1993
CLERK, SUPREME COURT
By ________
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,082

MICHAEL WHITE, a/k/a MICHAEL BETHEA, a/k/a HENRI WHITE,

Respondent.

______________________________/

# MERITS BRIEF OF PETITIONER

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## STATEMENT OF THE CASE AND FACTS

Respondent, Michael White, a/k/a Michael Bethea, a/k/a Henri White (hereinafter White), was convicted by a jury of robbery, possession of a controlled substance, possession of drug paraphernalia, carrying a concealed firearm, and opposing an officer without violence occurring on April 19, 1990 (R. 6-8, 53-54), for which he was adjudicated guilty (R. 202-204) and sentenced to prison as an habitual felony offender for seventeen years for robbery and essentially to time served on the other offenses (R. 203-204). The trial court also imposed a seventeen-year prison sentence for the offense of escape, to be served concurrently with the robbery sentence. (R. 204)

Prior to sentencing, the prosecutor filed three notices of its intention to seek habitual offender sentencing (R. 15, 19, 86) and also personally related this information to White (T. 196-197).

At the sentencing hearing, the prosecutor placed in evidence certified copies of several prior felony convictions and a certificate from the Office of Executive Clemency indicating that White had not been pardoned for any of his offenses (R. 64-84). (The face of the documents reflect that they were filed in open court. See pages 63, 64, and 81.) The documentary evidence proved that White received sentences on January 16, 1984, October 21, 1985, March 16, 1987, and October 10, 1988. (R. 64-84) The guidelines scoresheet, to which there was no objection, reflected that White had previously committed seven felonies, which placed

him in the permitted sentencing range of 9 to 22 years' imprisonment. (R. 95)

The following colloquy took place at the sentencing hearing:

> DEFENSE COUNSEL: Your Honor, if you're going to designate Mr. White as a habitual offender ... [ellipsis in original]
>
> COURT: I am.
>
> DEFENSE COUNSEL: ... [ellipsis in original] then I'm going to request that he receive a fifteen year habitual sentence, the reason being the habitual felony offender means that Mr. White will lose significant amount of gain time, he will be classified differently than everybody else and that his stay in prison will be much longer. A twenty year sentence without the habitual felony designation is a lot shorter than a fifteen year sentence with a habitual felony designation.
>
> COURT: Mr. White, you have a terrible criminal history here. I mean you really -- even the most creative judge would be severely handicapped by what he could do to try to structure some sentence for you that would make life a little more meaningful for you. This is terrible. I've seen worse, but this one comes close to being one of the worst. *** [sentence imposed]
>
> DEFENDANT: All right. I want to say something now. I got a bad record, it's true enough, and I put myself in this situation and I'll go with it. Y'all have a good day.

(T. 202-204)

White appealed from his judgment and sentence raising two issues relating to the guilt phase and one issue relating to the penalty phase (trial court failed to comply with the provisions of the habitual offender statute). The First District Court of

Appeal affirmed, without discussion, White's conviction but reversed his sentence because the trial court had failed to make specific findings regarding whether the predicate offenses had been set aside or whether White had been pardoned. It certified the same question that was certified in Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), review pending, Case No. 79, 535.

## SUMMARY OF ARGUMENT

Although the trial court did not make specific statutory findings, the error was harmless. The unrebutted evidence in the record shows that White qualified for sentencing as an habitual felony offender.

## ARGUMENT

ISSUE (CERTIFIED QUESTION)

> DOES THE HOLDING IN EUTSEY V. STATE, 383 SO.2D 219 (FLA. 1980) THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT], "EUTSEY AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

In State v. Rucker, 18 Fla. L. Weekly S93 (Fla. February 4, 1993), this Court recently answered the certified question presented in the instant case, stating "We answer in the negative and quash the decision of the district court." It elaborated:

> In Eutsey v. State, 383 So.2d 219 (Fla. 1980), we ruled that the burden is on the defendant to assert a pardon or set aside as an affirmative defense. Although this ruling does not relieve a court of its obligation to make the findings required by section 775.084, we conclude that where the State has introduced unrebutted evidence--such as certified copies--of the defendant's prior convictions, a court may infer that there has been no pardon or set aside. In such a case, a court's failure to make these ministerial findings is subject to harmless error analysis.

Id., at S94.

In the instant case, the trial court did not make specific findings of fact to support its conclusion that White qualified for sentencing as an habitual felony offender. However, the documentary and testimonial evidence that is in the record on

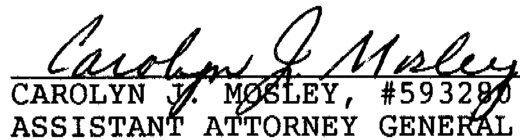
appeal amply supports the trial court's conclusion. White did not challenge the placement in evidence of certified copies of his prior felony convictions. White, himself, admitted that he had a "bad record." (R. 204) In view of this evidence, the trial court's failure to make specific findings of fact was harmless error. Were this court to remand this case for resentencing, the result would be "mere legal churning."

## CONCLUSION

Based on the foregoing discussion, the First District's decision should be quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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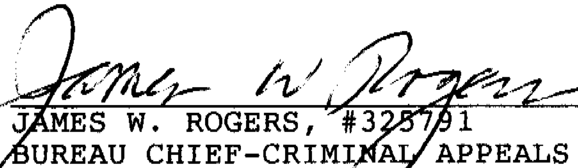

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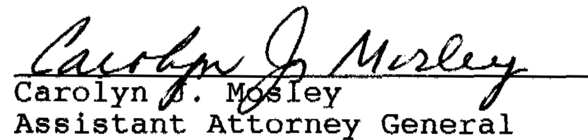
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to Carol Ann Turner, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 12th day of February, 1993.



Carolyn J. Mosley
Assistant Attorney General

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STATE OF FLORIDA,

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_______________________________/

APPENDIX

White v. State, Slip Opinion (Fla. 1st DCA December 14, 1992)

71- 111178-TZ, R

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL WHITE, a/k/a MICHAEL BETHEA, a/k/a HENRI WHITE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 91-1672

Docketed
12-16-92
Florida Attorney General

RECEIVED
DEC 15 1992
Criminal Appeals
Dept. of Legal Affairs

Opinion filed December 14, 1992.

An Appeal from the Circuit Court for Alachua County. Thomas Elwell, Judge.

Nancy A. Daniels, Public Defender; Carol Ann Turner, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

SHIVERS, Judge.

Michael White appeals his judgment and sentence as a habitual offender. Of the issues raised, one has merit. We agree that this case must be remanded for the trial court to make specific findings regarding whether White's prior felonies were pardoned or set aside pursuant to subsections 775.084(1)(a)(3) and (4). See Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA

1991); Jones v. State, 17 F.L.W. 2375 (Fla. 1st DCA Oct. 14, 1992). As in Anderson, we certify the following question to the supreme court as one of great public importance:

> Does the holding in Eutsey v. State, 383 So. 2d 219 (Fla. 1980), that the state has no burden of proof as to whether the convictions necessary for habitual felony offender sentencing have been pardoned or set aside, in that they are 'affirmative defenses available to [a defendant]', relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside?

REVERSED and REMANDED.

MINER and ALLEN, JJ., CONCUR.